

RECEIVED

SEP 27 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Interconnection and Resale Obligations) CC Docket No. 94-54
Pertaining to)
Commercial Mobile Radio Services)

OPPOSITION TO PETITIONS FOR RECONSIDERATION

AT&T Corp. ("AT&T"), by its attorneys and pursuant to 47 C.F.R. § 1.429(e), hereby opposes the petitions for reconsideration of the Commission's Order in the above-captioned proceeding,^{1/} filed by the National Wireless Resellers Association ("NWRA"), the Cellular Resellers Association ("CRA"), and Connecticut Telephone and Communication Systems, Inc. ("Connecticut Telephone").^{2/} In addition, AT&T comments on the petitions for reconsideration filed by the American Mobile Telecommunications Association, Inc. ("AMTA") and Nextel Communications, Inc. ("Nextel") and supports the petition for reconsideration filed by the Personal Communications Industry Association ("PCIA").^{3/}

^{1/} In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, FCC 96-163 (released July 12, 1996) ("Order").

^{2/} See Petition for Reconsideration of the National Wireless Resellers Association (filed August 23, 1996) ("NWRA Petition"); Petition for Reconsideration of the Cellular Resellers Association (filed August 23, 1996); and Petition for Reconsideration of Connecticut Telephone and Communication Systems, Inc. (filed August 23, 1996) ("Connecticut Telephone Petition").

^{3/} See Petition for Reconsideration of the American Mobile Telecommunications Association, Inc. (filed August 23, 1996) ("AMTA Petition"); Petition for Reconsideration on Clarification of Nextel Communications, Inc. (filed August 23, 1996) ("Nextel Petition"); and Petition for Reconsideration and Clarification of the Personal Communications Industry Association (filed August 23, 1996) ("PCIA Petition").

INTRODUCTION

NWRA, CRA, and Connecticut Telephone take issue with the Commission's decision to sunset its CMRS resale rule in five years. In essence, these parties argue that the Commission is obligated to retain the rule in perpetuity regardless of the state of competition of the CMRS market. Because this position is unsupported by both law and policy, the Commission should reaffirm the sunset provision.

AT&T does not necessarily oppose AMTA's and Nextel's requests that the Commission reconsider its definition of "covered SMR providers." Nevertheless, if the Commission decides to exclude geographic SMR licensees that provide mainly dispatch or data services from the resale obligation, it would have little basis for including dispatch or data services provided over cellular spectrum within the ambit of the resale rule. There is no justification for treating like services differently simply because the licensees use different portions of the spectrum.

Finally, AT&T wholeheartedly concurs with PCIA's proposals to clarify that CMRS operators are not obligated to make available the non-Title II components of bundled packages or to provide access to proprietary technologies and products. These clarifications would help ensure that the resale obligation does not have unintended anticompetitive consequences.

I. The Commission Should Affirm Its Decision To Sunset the CMRS Resale Rule

According to NWRA, the Commission has no discretion to change its resale policy now or in the future so long as resale remains "privately beneficial without being publicly

detrimental."^{4/} Contrary to NWRA's assertion, Sections 202(a) and 201(b) of the Communications Act and Commission precedent do not require the retention of an explicit resale rule in perpetuity. As the Commission made clear, to determine whether restrictions on resale are unjust or unreasonably discriminatory, the benefits of a resale requirement must be weighed against the costs. While the Commission determined in previous orders that restrictions were generally unjust and unreasonable at that time,^{5/} those decisions do not prevent the Commission from reaching a different conclusion if market conditions have changed.

Moreover, the Commission's predictions about the state of the wireless market five years from now are far from mere speculation. The Commission has completed auctions and issued licenses for three new broadband PCS competitors in every market, and applicants are currently bidding for three more broadband PCS licenses. Even if some of these licensees choose to provide "niche" services, NWRA's belief that the mobile services market will remain essentially static is entirely unsupported. Indeed, as the Commission found last year, cellular prices already have declined in anticipation of the widespread availability of PCS.^{6/}

As PCIA points out, the current level of competition in the CMRS marketplace is much greater than that in any other telecommunications segment where a federal resale

^{4/} NWRA Petition at 14 (citing Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 280 (1976)).

^{5/} See Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d at 283; Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167, 171-174 (1980).

^{6/} Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 -- Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Radio Services, 10 FCC Rcd 8844, 8851-52 (1995).

requirement has been imposed.^{7/} These market conditions significantly diminish the potential for anticompetitive behavior. Resellers today have abundant choices of carriers from whom to purchase services and, as noted above, the number of facilities-based CMRS operators will increase significantly over time. The added competition will also encourage carriers to engage in resale on a voluntary basis as they seek alternative ways to distribute their services and fill capacity on their systems.

Contrary to NWRA's assertion, there are multiple costs associated with mandating resale, including increased legal and administrative costs and deterred aggressive pricing practices and innovative offerings.^{8/} Thus, given the minimal benefits of requiring resale in a competitive market, it is abundantly clear that the costs of resale will far outweigh the advantages of such regulation in five years. As NWRA itself asserts, it is time to stop "artificially skew[ing] the interplay of forces in the wireless marketplace."^{9/} Indeed, the Commission should leave resale decisions "to the ever-changing dynamics of the marketplace itself."^{10/}

^{7/} PCIA Petition at 5. Connecticut Telephone grossly mistakes the Commission's view on the level of competition necessary to warrant elimination of the resale rule. See Connecticut Telephone Petition at n.3. The Commission nowhere stated that until there is "perfect competition" carriers will be able to impose unreasonable restrictions on resale. The Commission merely stated that "the market for cellular services 'is not the model of perfect competition.'" Order at ¶ 17.

^{8/} See PCIA Petition at 9.

^{9/} NWRA Petition at 20.

^{10/} Id.

II. The Commission Should Treat Like Services Similarly for Purposes of the Resale Rule

In the Order, the Commission determined that the resale obligation would apply only to cellular, broadband PCS and "covered SMR providers."^{11/} AMTA and Nextel contend that the Commission's definition of "covered SMR" is insufficiently clear because, while it excludes local SMR licensees that offer mainly dispatch services in a non-cellular configuration, and data, one-way, or stored voice services on an inter-connected basis, it arguably includes holders of geographic and extended implementation SMR licenses that offer these services.^{12/}

In its Petition for Partial Reconsideration, AT&T pointed out that the Commission's decision to exclude most SMR data services from the resale rule will place AT&T at an extreme competitive disadvantage because AT&T provides data services over its cellular spectrum that compete directly with, and are essentially the same as, those provided by SMR operators.^{13/} While AT&T does not necessarily oppose AMTA's and Nextel's proposed clarifications, they do underscore that, for purposes of the resale rule, it is necessary to look at the nature of the service rather than the portion of spectrum over which that service is provided. To the extent the resale rule is unduly burdensome for SMR dispatch and data

^{11/} Order at ¶ 17.

^{12/} Nextel Petition at 6; AMTA Petition at 4-5. AT&T disagrees with Nextel's contention that all SMR services should be exempted from the resale requirement. Nextel Petition at 2-4. If the Commission chooses to retain the resale requirement for cellular and PCS, it must do the same for services that compete in the same market.

^{13/} Petition of AT&T Corp. for Partial Reconsideration at 4-5 (filed August 23, 1996) ("AT&T Petition").

services, it is likewise unduly burdensome as applied to other broadband data and dispatch services.

III. The Commission Should Adopt PCIA's Proposed Clarifications Regarding Bundled Service/CPE Packages and Proprietary Technologies

PCIA correctly points out that there is absolutely no basis for expanding the resale requirement to include the non-Title II components of bundled packages offered by CMRS providers.^{14/} Because the resale obligation is grounded in Sections 201 and 202 of the Communications Act, services subject to resale must be regulated under Title II. The Commission simply has no authority to require resale of customer premises equipment ("CPE") and enhanced services.^{15/}

Even if the Commission could legally extend the resale requirement to such equipment and services, there is no policy justification for doing so. As AT&T noted, the CPE and enhanced services markets are extremely competitive and, thus, resellers have ample sources available to purchase these components to create their own bundled packages.^{16/} In addition, such a rule expansion would deter carriers from offering the creative packages desired by consumers.

In a similar vein, the Commission should grant PCIA's request to relieve CMRS operators of the obligation to provide access to proprietary technologies and products in the course of offering resale services.^{17/} Failure to make this clarification would deter carriers

^{14/} See PCIA Petition at 13. See also AT&T Petition at 2-3.

^{15/} PCIA Petition at 13-14.

^{16/} AT&T Petition at 3-4.

^{17/} PCIA Petition at 16-17.

from expending the resources necessary to create new and innovative offerings. Carriers must be able to distinguish themselves in this manner or the pace of technological development will slow considerably.^{18/}

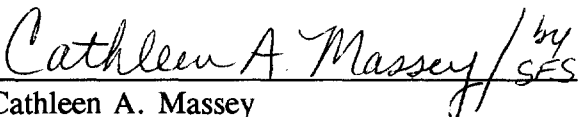
^{18/} Id. AT&T also urges the Commission to adopt PCIA's requested clarification that the resale policy only prohibits restrictions that are unreasonable, not all restrictions. Id. at 11.

CONCLUSION

For the foregoing reasons, the Commission should affirm its decision to sunset the resale requirement. In addition, the Commission should ensure that similar services are treated in a similar manner. Finally, the Commission should clarify that the resale requirement does not attach to the non-Title II components of bundled packages and that carriers are not required to make available to resellers proprietary technologies or products.

Respectfully submitted,

AT&T CORP.


Cathleen A. Massey
AT&T Wireless Services, Inc.
Vice President - External Affairs
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20037
202/223-9222

Howard J. Symons
Sara F. Seidman
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Of Counsel

September 27, 1996

CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that on this 27th day of September, 1996, I caused a copy of the foregoing "Opposition to Petitions for Reconsideration" to be delivered by messenger (*) or first class mail to the following:



Tanya Butler

Jeffrey Steinberg*
Policy Division
Federal Communications Commission
2025 M Street, N.W., Room 5126
Washington, D.C. 20554

Jackie Chorney*
Legal Counsel
Office of Commissioner Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Michele C. Farquhar*
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Lauren Belvin*
Senior Legal Advisor
Office of Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

David Furth*
Chief
Commercial Wireless Division
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Suzanne Toller*
Legal Advisor
Federal Communications Commission
Office of Commissioner Chong
1919 M Street, N.W., Room 844
Washington, D.C. 20554

International Transcription Service*
2100 M Street, N.W., Room 140
Washington, D.C. 20554

David Siddall*
Federal Communications Commission
Office of Commissioner Ness
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Lewis J. Paper
David M. Janas
Jacob S. Farber
Dickstein, Shapiro, Morin
& Oshinsky, LLP
2101 L Street, N.W.
Washington, D.C. 20037

Mark J. Golden
Vice President - Industry Affairs
Personal Communications Industry
Association
500 Montgomery Street
Suite 700
Alexandria, Virginia 22314

Douglas L. Povich
Kelly & Povich, P.C.
1130 30th Street, N.W., Suite 300
Washington, D.C. 20007

R. Michael Senkowski
Karen A. Kincaid
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
F1/58694.1

Alan R. Shark
President
American Mobile Telecommunications
Association, Inc.
1150 18th Street, N.W., Suite 250
Washington, D.C. 20036

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006